United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7457

In The

United States Court of Appeals

For The Second Circuit

JAMES MORRISSEY,

Plaintiff-Appellant-Appellee,

vs.

NATIONAL MARITIME UNION OF AMERICA,

Defendant-Appellant-Appellee,

and

JOSEPH CURRAN, SHANNON J. WALL and CHARLES SNOW,

Defendants-Appellants.

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CORE BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

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CORE BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

This Core Brief is submitted on behalf of all defendants-appellants to present those arguments which are common to all of them. Arguments applicable solely to an individual defendant-appellant will be set forth in their separate briefs filed herewith.

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from a judgment and order of the United States District Court for the Southern District of New York (Ward, J.) denying the defendants' motion for a new trial and for judgment N.O.V. except to the extent of granting the motion of defendant National Maritime Union for judgment N.O.V. on the award of punitive damages against it. Plaintiff has cross-appealed from the granting of judgment N.O.V. on his claim for punitive damages against defendant National Maritime Union of America. The decision of the court below is officially reported at 397 F. Supp. 659 (S.D.N.Y. 1975), and is printed in the joint appendix hereto (703A).[1]

Statement of Facts

Defendants National Maritime Union of American (hereinafter "NMU") is a labor organization representing unlicensed seamen in the American Merchant Marine. Prior and subsequent to July 1, 1971, it operated a hiring hall located at 36 Seventh Avenue, New York, New York. For at least a year prior to July 1, 1971, a notice was posted in the hiring hall which

1. References are to pages in the Joint Appendix and Joint Exhibit volumes.

prohibited soliciting and the distribution of unauthorized literature inside the hiring hall (736E). This notice stated:

> "It is the established policy of the National Maritime Union that only official union publications may be distributed inside the hiring hall or other union offices. No solicitation is permitted inside any union buildings. Any persons attempting to solicit sales or distribute unauthorized literature inside NMU buildings will be asked to discontinue such practice and, in the event they fail to comply with such request will be required to leave the premises.
>
> s/ Shannon J. Wall"

At the time the notice was posted, and at all times herein relevant, defendant Shannon J. Wall was the Secretary-Treasurer of the National Maritime Union, defendant Joseph Curran was the President of the National Maritime Union, and defendant Charles Snow was the Union's Chief of Security. Mr. Snow was a retired police officer of the New York City Police Department who had been hired to maintain order in the hiring hall. Mr. Snow testified that the notice was posted in response to his request following numerous incidents, including fights, arising out of the distribution of literature inside the hiring hall (467A). The policy reflected in the notice had been the established policy of the NMU even prior to 1963 (526A).

Plaintiff James M. Morrissey was a candidate for the office of Secretary-Treasurer, in opposition to defendant Wall in the union's 1966 and 1969 elections. In connection with his

campaigning for office, Morrissey distributed a publication which he titled the "Call for NMU Democracy" (136A-138A). In addition, in January of 1969 Morrissey and two other members of the union, who had been candidates for office with Morrissey, a Joseph Padilla and a Ralph Ibrahim, had instituted a suit against the defendants Curran and Wall alleging violations of Section 501 of the Labor-Management Reporting and Disclosure Act of 1959.

At various times during the year 1971 Morrissey distributed to union members issues of his "Call for NMU Democracy" normally printed in pamphlet form. As was the custom in the union, this literature was distributed outside at the entrance to the hiring hall. However, commencing May 14, 1971, Morrissey attempted to distribute issues of the "Call" *inside* the hiring hall (129A). Thereafter distributions were made almost continually on a daily basis (147A-148A). On those occasions when he distributed the pamphlets inside the hiring hall, he was asked to cease distributing them inside the hiring hall and to go outside and distribute them at the entrance. He complied with these requests (353A). Prior to the arrest of Morrissey, other persons who had distributed literature within the union hall had complied with requests to distribute the same outside the hall (429A-430A).

On July 1, 1971, Morrissey came to the NMU hiring hall and again began distributing his literature inside the building. He was then asked by a Mr. James Nimmo, a master-at-arms employed by the union, who was on duty at the entrance, to distribute his pamphlets outside (334A). He refused to do so, even though Nimmo asked him on numerous occasions (355A).

Finally, Nimmo called Charles Snow, the Chief of Security (335A, 428A). Snow then consulted with an attorney representing the union, Stanley Gruber, Esq., and asked him what action he should take with respect to Morrissey's refusal to cease the distribution of literature inside the hall. Gruber advised Snow that he should request the arrest of Morrissey if the latter refused to obey the posted rule with respect to the distribution of unauthorized literature (526A).

Snow then told Nimmo to again ask Morrissey to leave and, if he refused, to call the police. Nimmo again asked Morrissey to distribute the literature outside the hall. Morrissey again refused and Nimmo then called the police (457A). Two police officers responded and went to Snow's office with Morrissey. Morrissey was again asked to cease distribution of his literature by the police officers and he was told by them that if he didn't, they would be required to arrest him. Morrissey responded by putting out his hands as if to have handcuffs put on him and told the police officers to lock him up (459A).

Morrissey then went with the police officers to the police station. He was neither handcuffed nor fingerprinted (177A). At the precinct, after being asked certain questions, he was given a universal (Vera) summons to appear in court (177A). He remained at the precinct station for no more than 30 to 45 minutes (438A). At the police station a police officer, upon the complaint of Nimmo, prepared the charges to be listed against Morrissey (438A).

On the day that the arrest took place neither defendant Curran nor defendant Wall was in the union hiring hall. Wall

learned of the arrest no earlier than the following day (392A), and Curran, who was in Florida at the time, learned of it a few days later (359A).

On July 13, 1971, Nimmo went to the office of the New York District Attorney and spoke to an Assistant District Attorney, Clifford Fishman, who determined the charges to be placed against Morrissey. Mr. Fishman determined to charge him with criminal trespass in the third degree and with disorderly conduct (268A).

An arraignment was held on these charges on July 13, 1971, before Peter J. Quillan, Judge of the New York City Criminal Court (765E-769E). This arraignment lasted from two to four minutes (291A) and resulted in the charge of disorderly conduct being dismissed (768E) and the charge of criminal trespass in the third degree being set down for a preliminary hearing on July 20, 1971.

On July 20, 1971, Morrissey appeared before the Honorable William E. Ringel for the preliminary hearing (776E-806E). This preliminary hearing lasted from 20 minutes to one-half hour (293A), following which the court sustained a demurrer to the complaint.

Thereafter Morrissey brought suit against the National Maritime Union of America, Joseph Curran, Shannon Wall, Charles Snow, James Nimmo, Abraham E. Freedman and Charles Sovel alleging that defendants were guilty of malicious prosecution and violated his rights under the Landrum-Griffin Act in causing him to be arrested.

On March 20, 1975, the case was reassigned to the Honorable Robert J. Ward for trial under the Southern District's crash program. Judge Ward held a pre-trial conference on April 4, 1975 (29A), at which time he directed that the trial begin ten days later, on April 14, 1975 (695A). Counsel for defendant Curran then contacted Curran in Florida (Curran had retired in 1973) to advise him to be ready for trial on April 14, 1975. At that point, counsel was advised by Curran that he had just undergone a series of medical tests and might have to go into the hospital for emergency surgery on April 14, 1975. This fact was communicated back to Judge Ward with the request that the trial be adjourned until Curran could be available. Counsel also offered to obtain an appropriate medical affidavit. Judge Ward, however, refused to grant an adjournment, and advised counsel that it would not be necessary to obtain a medical affidavit as he would not grant the adjournment in any event (695A-696A). This request for an adjournment was renewed at the beginning of the trial on April 14, 1975, and again Judge Ward denied the adjournment (27A-30A). Curran was not available and did not come to New York for the trial. In fact, at the time that the trial was going on, he was undergoing surgery in Florida for cancer of the colon (698A).

During the course of the trial, counsel for defendants contended that Morrissey had sought to bring about his own arrest in order to test the rule on the distributing of literature inside the building, a fact which, if established, would mitigate the claim that the arrest was motivated by malice. In support of this defense, counsel for defendants sought to offer into evidence a letter dated July 27, 1971, that was sent to defendant Curran as President of the Union, by a Mr. Ralph Ibrahim, a member

of the Editorial Board of Morrissey's "Call" (Defs. Ex. B, 833E). In this letter Ibrahim requested that certain newspaper articles relating to Morrissey's arrest be published in the NMU's own paper, The Pilot, and stated:

> "It should be brought to the membership's attention that James Morrissey *subjected himself to criminal prosecution* in order to establish this principle" (referring to the right to distribute literature inside the union halls). (Emphasis supplied.)

Ibrahim testified that he was part of Morrissey's dissident group in the union (536A) and there was independent evidence that the letter had been sent from the office in which Morrissey's wife, Hannah Morrissey, was working (546A-548A), and the initials of the typist on the letter were "hm," the initials of Mrs. Morrissey. Morrissey testified that his wife assisted him in the typing and preparation of letters and pamphlets (493A-495A). Despite these facts, the trial judge refused to admit the Ibrahim letter into evidence (555A).

During the course of the trial, plaintiff voluntarily discontinued his action as against defendants James Nimmo, Abraham E. Freedman and Charles Sovel (563A-564A, 598A-599A). The trial judge then submitted the case to the jury under a charge which permitted the jury to award damages separately for violation of the Landrum-Griffin Act and for malicious prosecution. With respect to plaintiff's claims under the Landrum-Griffin Act, the trial judge instructed the jury that they could award a verdict under the Act if they found a violation of

either Section 411(a)(2) of the Act or Section 411(a)(5) of the Act. In instructing the jury on Section 411(a)(2), the trial judge charged the jury that the notice with respect to the distribution of literature had not been duly promulgated and therefore did not permit the jury to pass upon whether the rule prohibiting distribution of literature inside the hiring hall was a "reasonable" rule (615A-616A).

With respect to Section 411(a)(5), the trial judge instructed the jury that they could find that causing Morrissey to be removed from the hiring hall was "discipline" if it restricted or inhibited his rights as a member of the union (616A). At the same time, in instructing the jury on malicious prosecution, the trial judge told the jury that the initiation of a criminal prosecution by having Morrissey arrested could be the basis for awarding separate damages for malicious prosecution (617A).

The trial judge submitted the case to the jury under a form of verdict which allowed them to award damages both for violation of the Landrum-Griffin Act and for malicious prosecution (632A). The jury found in favor of plaintiff on both claims and awarded damages as follows (727A-728A):

Landrum-Griffin Act: Compensatory damages:	$500
Punitive Damages against the Union:	$50,000
against Curran:	$100,000
against Wall:	$60,000
against Snow:	$10,000
Malicious Prosecution: Compensatory damages:	$3,000
Puntive Damages against the Union:	$50,000

against Curran:	$25,000
against Wall:	$15,000
against Snow:	$20,000

Defendants then moved for judgment N.O.V. and for a new trial (687A-693A). These motions were denied by an opinion dated July 10, 1975, except insofar as the jury awarded punitive damages against defendant National Maritime Union (703A-723A).

ARGUMENT

POINT I

THE FAILURE OF THE TRIAL JUDGE TO ADJOURN THE TRIAL BECAUSE OF THE ILLNESS OF DEFENDANT JOSEPH CURRAN WAS AN ABUSE OF DISCRETION REQUIRING THE GRANTING OF A NEW TRIAL.

The right of a litigant to be present at trial, to confront those testifying against him, to aid his counsel in the conduct of the litigation, and to testify on his own behalf is basic and fundamental to our judicial system. Accordingly, the refusal to grant a continuance when a party litigant is not available for trial *by reason of illness* is an abuse of the trial court's discretion of such a serious nature as to require the granting of a new trial. *Gaspar v. Kassm,* 493 F.2d 964 (3rd Cir. 1974); *Latham v. Crofters, Inc.,* 492 F.2d 913 (4th Cir. 1974); *Davis v. Operation Amigo, Inc.,* 378 F.2d 101 (10th Cir. 1967); *Cornwell v.*

Cornwell, 118 F.2d 396 (D.C. Cir. 1941); *Harrah v. Morgenthau,* 80 F.2d 863 (D.C. Cir. 1937).

For any litigant to be compelled to forego attendance at trial because he is going under the surgeon's knife for emergency surgery to remove a cancerous tumor, only to come out of the anesthesia to find a substantial verdict has been rendered against him in his absence is both shocking and unconscionable.

In the instant case the trial judge called a pre-trial conference for Friday, April 4, 1975 (29A). At that conference he directed counsel to be prepared to begin the trial on Monday, April 14, 1975, just ten days later. Counsel for defendant Curran contacted Mr. Curran the following Monday. At that time counsel was advised that Mr. Curran had just undergone a series of medical tests and might have to enter the hospital for emergency surgery the following Monday, April 14, 1975, the date the trial was scheduled to begin. This fact was immediately made known to the trial judge with a request for an adjournment (695A). Counsel for Mr. Curran also offered to obtain an affidavit from Mr. Curran's treating physician (696A). The trial judge replied that it would not be necessary to obtain a medical affidavit *because the trial would go ahead in any event* (696A).[2] The medical tests proved to be unfavorable and Mr. Curran did enter the hospital on April 14, 1975 and on April 16, 1975 underwent surgery for the removal of a cancerous tumor from his colon (29A, 698A). It was while recovering from the effects of this surgery that he learned for the first time that the jury had returned verdicts against him in his absence in the amount of $128,500.

2. An affidavit was obtained from Mr. Curran's surgeon, Dr. Phillip DeWolfe, sworn to April 15, 1975, which is printed in the Joint Appendix at pages 697A-698A.

In the case at bar the availability of Mr. Curran at the trial was important not only to his own defense, but to the defense of the other defendants, for here virtually all of the plaintiff's evidence were statements attributed to Mr. Curran. Only Mr. Curran could adequately explain those statements, and only Mr. Curran could guide counsel in developing the proper response to the documents that were introduced as evidence. Moreover, the absence of Mr. Curran from the courtroom could only have been interpreted by the jury as an indication that he either lacked interest in the litigation or that he had no response to the plaintiff's claims.

While it is true that Mr. Curran's depositions were available, these depositions were discovery depositions taken by plaintiff's counsel, not depositions taken for use at trial for Mr. Curran's own defense. At the time these depositions were taken, it was not known what evidence would be received at trial, nor was there any way that counsel for Mr. Curran could anticipate what testimony by Mr. Curran would be needed at trial. As the court said in *Latham v. Crofters, Inc., supra,* 492 F.2d at 916:

> "Griffith's failure to preserve his testimony, *de bene esse,* may have been a censurable omission when viewed by hindsight, *but we cannot say that a party who has once had an illness must always record his testimony against the possibility that he may suffer another illness.* In short, there was an insufficient basis on which to require that Griffith's case be tried in his absence and under the circumstances where his version of the disputed transactions could not be presented to the triers of the facts." (Emphasis supplied.)

In any event, this Court frequently has recognized that depositions are always a very poor substitute for live testimony, *Arnstein v. Porter,* 154 F.2d 464 (2nd Cir. 1946); *Napier v. Bossard,* 102 F.2d 462 (2nd Cir. 1939).

However important may be the disposing of cases, and clearing the court's calendar, it cannot be so important as to outweigh the right of a litigant to be present at a trial where a substantial judgment may be rendered against him, particularly when his absence is due to circumstances beyond his control, such as illness. As the court stated in *Gaspar v. Kassm, supra,* 493 F.2d at 969:

> "Moreover, we can see no pressing necessity for haste albeit we are aware of the annoyance caused to a trial judge when his carefully arranged trial calendar is disarranged, but we cannot let this obscure the fact that we deem the grounds upon which the distinguished district judge acted were insufficient. We do not consider the motion for continuance to be deficient on its face. *It is customary to grant a continuance on the ground of illness of a party.* We conclude that Kassm's testimony was necessary for the defense of his case, that the granting of a continuance would not have unduly prejudiced the other parties, and that the continuance motion was not motivated by procrastination, bad planning or bad faith on the part of Kassm or his counsel. *It is the law that where none of the foregoing appear, the denial of a continuance for illness is abuse of discretion."* (Emphasis supplied.)

The cases relied upon by the trial judge in denying the continuance, *Davis v. United Food Company,* 402 F.2d 328 (2nd Cir. 1968), *cert. denied,* 393 U.S. 1085 (1969), and *Lamb v. Globe Seaways, Inc.,* 516 F.2d 1352 (2d Cir. 1975), involved a totally different situation and have no applicability to the instant case. *Davis* and *Lamb* were seaman's actions where the plaintiff was unavailable when his case was called for trial because he was away at sea. There was no question of them not being available by reason of illness. Rather, the plaintiffs were unavailable by reason of circumstances which were readily foreseeable for a seaman, namely that he would be away at sea when his case was reached for trial. In such circumstances, it is reasonable to expect counsel representing the seaman to anticipate the possibility that the seaman will not be available for trial and preserve his testimony by deposition.

In addition, the absence of the seaman from the jurisdiction at the time of trial is usually an act of the seaman's own choosing, and since it is the seaman himself who is bringing the suit, presumably with the recognition that the court will proceed to dispose of his case in the ordinary course of its business, it is not unreasonable to require the seaman to make provision for trial in his absence by preserving his testimony by deposition. See *Davis v. United Fruit Co., supra,* 402 F.2d at 330. In the instant case, however, Curran was not the plaintiff who had brought the suit, but rather a defendant who was being forced to litigate. His absence was by reason of illness — the need for emergency surgery — again not a matter of his own choosing. His absence was not by his own volition, and in these circumstances, he certainly is not imposing on the court by requesting an adjournment. "A court must not let its zeal for a tidy calendar overcome its duty to do justice," *Davis v. United Fruit Co., supra,* 402 F.2d at 331.

Despite the trial judge's comment that "Curran is not a young man" (719A), the fact is that he has recovered from the surgery, is alive today and is capable of coming to New York to appear in the defense of the action. The statement by the trial judge that counsel for Mr. Curran had given no assurance that he would be able to attend at a later date if the case had been rescheduled (719A) was unwarranted. At the time the case was called for trial, Mr. Curran was just in the process of undergoing the surgery. At that point it was impossible to know when he would be able to return simply because the surgery had not yet been completed. In any event, the trial judge refused to even grant a short adjournment in order to find out how long Mr. Curran would be disabled. The fact of the matter is that the trial judge advised counsel for defendants that he was going ahead with the trial on April 14, 1975 without regard to whatever might have been stated in a medical affidavit by Mr. Curran's treating physician. In so doing, the trial judge erred and a new trial should be granted.

POINT II

THE COURT BELOW ERRED IN SUBMITTING PLAINTIFF'S CLAIMS UNDER THE LANDRUM-GRIFFIN ACT TO THE JURY.

Plaintiff alleged two violations of the Landrum-Griffin Act:

(1) An alleged violation of 29 U.S.C.A. 411(a)(2) (commonly referred to as the "free speech provision"), and

(2) An alleged violation of 29 U.S.C.A. 411(a)(5) (commonly referred to as the "improper discipline" provision).

The trial judge submitted both these theories to the jury under a form of verdict which allowed the jury to return a general verdict as to the claims under the Landrum-Griffin Act, without specifying whether the verdict was based on a finding of a violation of the free speech provision, 29 U.S.C.A. 411(a)(2), a violation of the improper discipline provision, 29 U.S.C.A. 411(a)(5), or a violation of both provisions (616A)..

We will demonstrate in this section of this brief that the trial judge erred in the manner in which he submitted *both* alleged violations. However, while there was error with respect to submission of *both* claims, since the form of the verdict makes it impossible to determine whether the jury's verdict was based on a finding of a violation of the free speech provision, the improper discipline provision, or both, a new trial must be awarded if the submission under *either* section of the statute was improper. See *Stromberg v. People of California,* 28 U.S. 359, 368, 51 S. Ct. 532, 535 (1931); *Fatovic v. Nederlandsch-Ameridanasche Stoomvaart,* 275 F.2d 188, 190 (2nd Cir. 1960); *Klapmeier v. Telecheck International, Inc.,* 482 F.2d 247, 255, fn.5 (8th Cir. 1973).

A. The court below erred in refusing to submit to the jury the question of whether the rule prohibiting the distribution of literature was a "reasonable rule relating to the union's performance of its legal or contractual obligations."

Section 411(a)(2) of the Landrum-Griffin Act provides:

> "Every member of any labor organization shall have the right to meet and assemble freely with

> other members; to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce *reasonable rules as to the responsibility of every member* toward the organization as an institution and *to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."* (Emphasis supplied.)

The right of free speech and assembly guaranteed to union members in section 411(a)(2) is not absolute. The *proviso* to the statute makes it clear that a union may adopt and enforce "reasonable rules" as to the responsibility of every member to refrain from conduct which would interfere with a union's "performance of its legal or contractual obligations." The NMU's rule prohibiting distribution of literature inside the hiring halls was such a rule.

There can be no doubt that the National Maritime Union was under a "legal" duty to maintain order in its hiring halls. This was not a duty derived from the union's status as a labor organization, but rather was a duty which arose by virtue of the union's status as the operator of a building where people congregated. The union's obligation as a property owner and

operator to maintain order in its buildings arises by force of law, and is not dependent upon nor can it be limited by the union's constitution, or by the failure of the members of the union to ratify a rule prohibiting fighting.

In the instant case, the notice which plaintiff refused to obey prohibited the solicitation of sales and the distributing of unauthorized literature inside union buildings. The evidence disclosed that this notice was posted at the request of the Union's Chief of Security, Charles Snow, to enable him to maintain order inside the hiring hall. Thus Mr. Snow testified:

> "Q. Did you have any conversation with Mr. Wall about that notice? A. Yes.
>
> Q. When did you have your conversation with Mr. Wall about the notice? A. Prior to his making it up.
>
> Q. When was that? A. A long time before. I can't remember the exact date.
>
> Q. Do you remember the approximate date? A. It was after a series of events had consequently [sic: constantly] been going on wherein we were getting peddlers coming in, selling encyclopedias and books, religious articles, people coming in asking for contributions to rather doubtable (sic) charities, and also, and most important, after we had stopped, *I would say innumerable arguments and*

> *fights took place inside the hiring hall when literature was being handed out over which there was disagreement."* (557A). (Emphasis supplied.)

The notice did not seek to prohibit the distribution of unauthorized literature at *all* places and at *all* times. Rather, the prohibition related only to the *inside* of the hiring halls, and it was the established practice of the union to permit such literature to be distributed at the entrances to the hiring halls where it could be given to all who entered or exited the building. In fact, the union has a constitutional provision, which was adopted by the Department of Labor in supervising the union's elections, that election literature could *not* be distributed inside the union buildings where voting was taking place. (See Plaintiff's Exhibit 25, page 45, Article 12, Section 6(b).) While this constitutional provision does not directly apply to distribution of literature during non-election periods, the fact that it was not considered to be unduly restrictive of the right of members to communicate with each other during election periods, when such communication is most important, is itself evidence of the reasonableness of the rule.

B. The court below erred in concluding that the notice was not duly promulgated.

In submitting plaintiff's claim under Section 411(a)(2) to the jury, the trial judge instructed the jury that, as a matter of law, the notice was not duly promulgated by the union (615A, 650A). In so doing, the trial judge took from the jury two crucial issues of fact, *i.e.*, whether the rule was properly adopted, and whether the rule was "reasonable."

In his decision denying defendants' post-trial motions, the trial judge stated that the reason he took these questions from the jury was that, in his view, the rule had not been properly promulgated, and, therefore, there was no question of fact for the jury to consider (708A-709A). This holding was error. It is apparent that the trial judge interpreted the NMU constitution as requiring membership ratification of *all* union rules. This is not so. Rather, membership approval is required only of decisions *changing* established policies, programs and procedures of the union (Plaintiff's Exhibit 25, Article 4, Section 1, p. 12). The NMU constitution establishes procedures for membership ratification of "major decisions" (Plaintiff's Exhibit 25, Article 4, Section 2(a), p. 13) and "emergency decisions" (Plaintiff's Exhibit 25, Article 4, Section 2(b), p. 13). However, management of the day-to-day affairs of the union is entrusted directly to the Union's National Office (Plaintiff's Exhibit 25, Article 8, Section 2(b), p. 32), and does not require membership ratification.

Rules relating to the management and administration of union buildings are part of the day-to-day affairs of the union and directly within the province of the National Office. This would include decisions such as the determination of the days on which union buildings will be open, the hours during which they will be open, rules prohibiting gambling inside union buildings, no smoking rules, where appropriate, and the like. A rule prohibiting solicitation inside union buildings falls within this area of regulation. In this regard, it must be remembered that the duty to maintain an orderly hiring hall is not derived from the union's constitution and is not subject to the wishes or

whims of the union's membership. The union officers are under a duty imposed by law to maintain order inside the hiring halls. They had authority to hire a Chief of Security to accomplish this end (NMU Constitution, Article 8, Section 11(a). Plaintiff's Exhibit 25, p. 36). In the instant case there was evidence that the notice in question had been put out by the National Office (566A), and that it was understood to reflect a policy of the union which had been in existence at least since 1963 (527A). There also was evidence that the notice had been posted a year prior to Mr. Morrissey's arrest (387A) in response to the request of the Chief of Security, Charles Snow to aid him in maintaining order in the hiring hall (389A). It was not a *change* in established policy requiring membership ratification, but rather an affirmation of what the union officers reasonably believed to be the existing policy. That there was no written evidence as to the original adoption of the policy, a fact on which the trial judge strongly relied, does not preclude the jury from considering whether the policy had been adopted long prior to the Morrissey arrest. Since the National Office had authority to adopt rules relating to the day-to-day affairs of the union, including the management of its buildings, without membership ratification, it was error for the trial judge to charge the jury that the rule had not been properly adopted.

By instructing the jury that the rule had not been properly adopted by the union, the trial judge also took from the jury the question of whether the rule was a "reasonable rule." However, in view of the testimony of Chief of Security Charles Snow as to the circumstances which led him to request the posting of the notice, the history of fights inside the union hall, together with

the established practice of distributing election material at the entrances to the hiring halls, but not inside them, there was an issue of fact as to whether the rule was a "reasonable" rule under the statute and the court below erred in not submitting this question of fact to the jury.

Since the charge of the trial court deprived the defendants of their right to have the jury determine whether the rule prohibiting the distribution of unauthorized literature inside the hiring hall was a "reasonable" rule relating to the performance of the union's legal obligations, it was in error and the defendants are entitled to a new trial on plaintiff's claim of an alleged violation of Section 411(a)(2) of the Act.

C. The court below erred in submitting plaintiff's claim under Section 411(a)(5) to the jury.

Section 411(a)(5) of the Landrum-Griffin Act provides:

> "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Section 411(a)(5) is a guarantee of *procedural due process* with respect to union disciplinary proceedings. It is not directly

dependent on, nor related to, the freedom of speech guarantee of Section 411(a)(2), and there can be a violation of Section 411(a)(5) *without* there being a violation of Section 411(a)(2), and vice versa. For example, a union may have a rule or regulation which is valid under Section 411(a)(2), but if it imposes discipline on a member for violation of that rule without complying with the procedural requirements of Section 411(a)(5), it will be in violation of the statute notwithstanding the reasonableness of the rule in question. Similarly detailed compliance with the procedural requirements of Section 411(a)(5) will not validate a rule which is unreasonable under Section 411(a)(2), *e.g., Salzhandler v. Caputo,* 316 F.2d 445 (2d Cir. 1963), *cert. denied,* 375 U.S. 946 (1963). While there may be instances where a rule which is in violation of Section 411(a)(2) is summarily enforced without compliance with the procedural requirements of Section 411(a)(5), with the result that *both* statutory provisions are violated, the rights guaranteed by these two statutory provisions are separate and distinct, with Section 411(a)(2) being substantive and Section 411(a)(5) being procedural.

The procedural requirements of Section 411(a)(5) do not apply to *all* actions of a disciplinary nature which a union may take. For example, Section 411(a)(5) does not protect a union member who is also an employee of his union from being discharged summarily from his position with the union. *Grand Lodge of Int'l. Ass'n. of Machinists v. King,* 335 F.2d 340, 342, fn.7 (9th Cir. 1964), *cert. denied,* 379 U.S. 920, 85 S. Ct. 274 (1964); *Gulickson v. Forest,* 290 F. Supp. 457, 463 (E.D.N.Y. 1968). While it is probably true that Section 411(a)(5) is not

limited solely to the protection of those rights which a member derives from his union's constitution, and may, for example, extend to the deprivation of a member's employment rights — rights which the union by virtue of its status as a collective bargaining representative has the power to influence, *cf., Detroy v. American Guild of Variety Artists,* 286 F.2d 75 (2nd Cir. 1961), *cert. denied,* 366 U.S. 929, 81 S. Ct. 1650 (1961) with *Figueroa v. National Maritime Union of America,* 342 F.2d 400 (2d Cir. 1963) — it is, we submit, *limited to action which the union takes in the exercise of its powers as a union.*

A union may act in many different spheres. A union may take action as a collective bargaining representative. It may also take action with respect to its internal affairs under its constitution. In such instances, it is acting in its role as a *union.* However, a union may also be an employer and may take action in its capacity as an employer, and, to the extent that a union may be a property owner or operator, it may also take action in its role as a property owner or operator. Actions taken by a union as an employer or as a property owner or operator are not the types of action to which Section 411(a)(5) can have any meaningful application. As an employer, a union must have the right to summarily discharge an employee to the same extent that a private employer would have such a right. If an employee of a union is caught destroying union property, the union would have the right, if not the duty to its members, to summarily discharge that employee, whether or not that employee also happened to be a member of the union. Similarly, if a member were creating a disturbance inside a union's hiring hall, the union, as the operator of the hiring hall, would have the

obligation to take action to stop that disturbance without regard to whether the person creating that disturbance was or was not a member of the union. To interpret the Landrum-Griffin Act as requiring a union to give notice and hold a hearing before taking action to stop someone from fighting on its property would be totally unreasonable.

Calling the police to have someone removed from a hiring hall is clearly not the type of union action to which Section 411(a)(5) refers. If calling the police is to be regarded as an act of discipline, then even where a member actually is engaged in the commission of a crime, the union would have to give him notice and hold a hearing before calling the police. As an example, in the instant case the trial judge charged the jury that the defendant would have been acting reasonably in having plaintiff removed from the hiring hall if his activities were creating an "immediate danger" of seriously interfering with the union's function (615A). Assuming for the moment that the jury were to have concluded that plaintiff's activities were creating such an "immediate danger," if calling the police to have him removed from the hiring hall was "discipline" within the meaning of Section 411(a)(5), then the union would have been required to give him notice and hold a hearing before having him removed, obviously an impossible situation and an unreasonable and distorted interpretation of the statute. We submit that Section 411(a)(5) applies only to the exercise of those powers which a union has by virtue of its status as a labor organization. It is the abuse of those powers which the Landrum-Griffin Act was designed to correct, and it is with respect to the exercise of those powers that Section 411(a)(5) imposes procedural protection.

D. The court below erroneously permitted duplication of recovery in allowing separate damages under Section 411(a)(5) and for malicious prosecution.

Finally, in permitting the jury to find a violation of Section 411(a)(5) based on the calling of the police to have plaintiff removed from the hiring hall, while at the same time permitting the jury to also award separate damages for malicious prosecution, the court below permitted an improper duplication of recovery. The initiation or furtherance of a criminal prosecution is an essential element of a claim for malicious prosecution. The court below so charged (617A). In the instant case the initiation of the prosecution was the calling of the police to arrest the plaintiff, the same act for which the trial judge permitted the jury to return a verdict under the Landrum-Griffin Act for an alleged violation of Section 411(a)(5). The court below thus permitted two recoveries for the same wrongful act, a result which clearly was improper. A plaintiff cannot recover damages twice for the same injury simply because he has two legal theories, *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 317 (1927); *Myers v. Isthmian Lines, Inc.,* 282 F.2d 28, 29, fn. 1 (1st Cir. 1960); *Westrick Battery Co. v. Standard Electric Co., Inc.,* 482 F.2d 1307 (10th Cir. 1973).

This question of duplicate recovery for a single wrong was argued to the trial judge on defendants' post-trial motion. The trial judge recognized that a duplicate recovery for the same act would be improper but held that in the instant case there was no duplicate recovery because plaintiff's claim under Section 411(a)(2) was different from his claim for malicious prosecution

(see 712A-714A). However, what the trial judge failed to recognize was that the duplication lay not between the claim for malicious prosecution and the alleged violation of Section 411(a)(2), but rather between the claim for malicious prosecution and the alleged violation of Section 411(a)(5). The decision below contains no discussion whatsoever of the duplication between the malicious prosecution claim and the claim under Section 411(a)(5), and apparently this was completely overlooked by the trial judge. However, it is clear that the trial court's charge did permit the jury to award damages under Section 411(a)(5) based solely on having the plaintiff arrested, the same act which formed the basis for plaintiff's malicious prosecution claim. The duplication in recovery is patent and requires that a new trial be granted.

POINT III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND AGAINST THE INDIVIDUAL DEFENDANTS UNDER SECTION 411(a)(2) OF THE LANDRUM-GRIFFIN ACT.

The trial judge instructed the jury that it could return a verdict against the individual defendants if it found that they had violated either the free speech provisions of Section 411(a)(2) or the improper discipline provisions of Section 411(a)(5). This was an incorrect interpretation of the statute. Section 411(a)(2) imposes no duties on individual officers or employees of labor organizations. Rather, the duty imposed by Section 411(a)(2) relates solely to the labor organization *as an*

entity. Thus the statutory language of Section 411(a)(2) refers to the right of a "labor organization" to adopt and enforce reasonable rules. In the single instance where the duties imposed by Section 411 of the Landrum-Griffin Act were intended to run against individual officers of a labor organization, Congress specifically so provided. This single instance is in Section 411(a)(5) which states, "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or *by any officer thereof. . . .*" (Emphasis supplied.) The specific reference in Section 411(a)(5) to "any officer thereof" demonstrates that when Congress intended to impose a duty directly enforceable against an officer of a labor organization, it *specifically* so provided. There is no comparable reference to "officers" of labor organizations in Section 411(a)(2), and, on the contrary, the proviso refers only to the right of the labor organization itself to adopt reasonable rules. The entire context of Section 411(a)(2) refers to action by a labor organization *as a labor organization.* Any violation of the rights guaranteed by Section 411(a)(2) would be a violation by the labor organization itself, and not by individual officers thereof. Accordingly, the trial judge erred in submitting the claims against the individual defendants under Section 411(a)(2).

POINT IV

THE COURT BELOW ERRED IN CHARGING THE JURY THAT ADVICE OF COUNSEL CANNOT BE CONSIDERED ON THE QUESTION OF PROBABLE CAUSE FOR THE PROSECUTION.

The court below charged that advice of counsel "can not be considered by you on the question of probable cause. . ." (622A) and that they could not consider advice of counsel "on the issue of probable cause" (624A). The law is to the contrary.

Restatement Torts §662, "Existence of Probable Cause" states:

> "One who initiates criminal proceedings against another has probable cause for so doing if he
>
> (a) reasonably believes that the person accused has acted or failed to act in a particular manner, and
>
> (b)
>
> (i) correctly believes that such acts or omissions constitute at common law or under an existing statute the offense charges against the accused, or

(ii) mistakenly so believes in reliance on the advice of counsel under the conditions stated in §666."

Restatement Torts §666, "Effect of Advice of Counsel" states:

"(1) The advice of an attorney at law admitted to practice and practicing in the state in which the proceedings are brought, whom the client has no reason to believe to be interested, *is conclusive of the existence of probable cause* for initiating criminal proceedings in reliance upon the advice if it is

(a) sought in good faith, and

(b) given after a full disclosure of the facts within the accuser's knowledge and information." (Emphasis supplied.)

It has been held that the law conclusively presumes probable cause from advice of counsel that the prosecution is proper. See, *e.g. Rogers v. General Electric Company,* 341 F. Supp. 971, 976 (W.D. Ark. 1972); *Stephens v. Brown & Root Inc.,* 338 F. Supp. 680, 683 (W.D. La. 1971). See also *Hernon v. Revere Copper & Brass, Inc.,* 494 F.2d 705 (8th Cir. 1974); *Worley v. Columbia Gas of Kentucky, Inc.,* 491 F.2d 256 (6th Cir. 1973). New York holds that advice of counsel "is competent and of substantial weight, both *on the issue of want of probable cause* and upon that of malice as affecting the amount of

damages." *Godfrey v. Medical Society of New York County,* 177 A.D. 684, 164 N.Y.S. 846 (2d Dept. 1917) (emphasis supplied).

> "The fact [that the defendant in making the criminal charge acted under advice of counsel] is, however, *material . . . to show probable cause for the prosecution. . . .*" 10 Encyclopedia of New York Law §826 (emphasis supplied).

The rationale underlying this doctrine is evident from the very nature of malicious prosecution, that the prosecution must be maintained recklessly. Proceeding upon the advice of counsel is the antithesis of reckless behavior, and clearly established reasonable belief in the guilt of the accused.

The error in the court's charge on probable cause was compounded by its further charge that:

> "If you find that a defendant did not have probable cause for believing plaintiff guilty at the time he initiated or furthered the prosecution, you may, though you're not required to, infer *from that fact alone* that that particular defendant acted maliciously" (623A) (emphasis supplied).

The jury having been erroneously instructed that is *could not* consider advice of counsel on the issue of probable cause, and that malice could be inferred from want of probable cause, the effect was that the jury was instructed that it could entirely

disregard the advice of counsel in determining liability for malicious prosecution. Thus, in violation of established principles of law, the defendants were entirely deprived of the defense of advice of counsel, which, as the authorities cited above demonstrate, has been held to be an absolute defense.

POINT V

THE COURT ERRED IN DENYING DEFENDANTS-APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO PUNITIVE DAMAGES.

A. Punitive damages are not recoverable under the Landrum-Griffin Act.

The overwhelming weight of authority is to the effect that punitive damages may not be recovered in actions under 29 U.S.C.A. §412, for violations of 29 U.S.C.A. §411. *McCraw v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry,* 341 F.2d 705, 710 (6th Cir. 1965); *Nix v. Fulton Lodge No. 2 of Int'l Ass'n of Machinists & Aerospace Workers,* 262 F. Supp. 1000, 1008 (N.D. Ga. 1967); *Magelssen v. Local Union No. 518, Operative Plasterers & Cement Masons' Int'l Ass'n,* 240 F. Supp. 259, 263 (W.D. Mo. 1965); *Cole v. Hall,* 35 F.R.D. 4, 8 (E.D.N.Y. 1964), *aff'd,* 339 F.2d 881 (2d Cir. 1965); *Burris v. International Brotherhood of Teamsters,* 224 F. Supp. 277, 280 (W.D. N.C. 1963).

As the Court stated in *Burris v. International Brotherhood of Teamsters, supra:*

". . . Nothing within the Act or in the legislative history of the Act indicates or specifies that punitive damages are 'appropriate' relief. One court has stated that 'it is obvious that the only damages which may be awarded under the authority of the statute are those which directly and proximately result from the violation.' . . . Cases decided under the Labor Management Relations Act (29 U.S.C.A. §141 et seq.) followed the theory that absent express Congressional intention punitive damages were not recoverable when invoking the jurisdiction of the court on a federally created cause of action. United Mine Workers of America v. Patton, 211 F.2d 742, 47 A.L.R. 2d 850 (4th Cir.), cert. denied, 348 U.S. 824, 75 S. Ct. 38, 99 L. Ed. 649 (1954). This court is of the opinion that a like theory is applicable to actions brought under the LMRDA." (224 F. Supp. at 280-1) (citation omitted). *Contra: Farowitz v. Associated Musicians of Greater New York Local 802,* 241 F. Supp. 895 (S.D.N.Y. 1965).

As the court stated in *United Mine Workers of America v. Patton,* 211 F.2d 742 (4th Cir. 1954), *cert. denied,* 348 U.S. 824, 75 S. Ct. 38 (1954):

> "Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by

> statute, it has found no difficulty in using language appropriate to that end. Thus, in copyright cases, 17 U.S.C.A. §1, in patent cases, 35 U.S.C.A. §34, and in anti-trust cases, 15 U.S.C.A. §15, the right to recover treble damages is expressly given." (211 F.2d at 749).

See also *Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964).

Even assuming that punitive damages may be awarded under the Landrum-Griffin Act, reliance in good faith on advice of counsel is a complete defense to such claim. A claim based on the Landrum-Griffin Act arises under federal law, not state law. The general rule in the United States has long been that good faith reliance on advice of counsel is a complete defense to a claim for punitive damages. *The Russian Church of Our Lady of Kazan v. Russian Orthodox Greek Catholic Church of America,* 67 Misc. 2d 1032 at 1061, 326 N.Y.S. 2d 727 at 758 (Sup. Ct. Nassau Co. 1971), *aff'd,* 41 A.D. 2d 746, 341 N.Y.S. 2d 148 (2d Dept. 1973), *aff'd,* 33 N.Y. 2d 456, 354 N.Y.S. 2d 631, 310 N.E. 2d 307 (1974); *Fox v. Aced,* 49 Cal. 2d 381 at 385, 317 P.2d 608 at 610 (1957); *United States v. Homestake Mining Co.,* 117 F. 481 (8th Cir. 1902); *The Mascotte,* 72 F. 684 (D.N.J. 1895); *Bonesteel v. Bonesteel,* 30 Wis. 511 (1872).

Here the evidence conclusively established that Chief of Security Snow acted only after consulting counsel for the union and, in good faith, in reliance on the advice he received (526A). This reliance on the advice of counsel is a complete defense to the claim for punitive damages under the Landrum-Griffin Act.

B. It was error as a matter of law to submit the issue of punitive damages for malicious prosecution to the jury.

In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 843 (2d Cir. 1967) this Court, describing the degree of moral culpability required by the New York courts for an award of punitive damages stated:

> "What comes through from a study of these and many other New York decisions is that the recklessness that will give rise to punitive damages must be close to criminality . . . and that, like criminal conduct, it must be 'clearly established.' " (Citation omitted.)

In *Gordon v. Nationwide Mutual Insurance Company*, 62 Misc. 2d 689, 309 N.Y.S. 2d 420 (Sup. Ct. Westchester Co. 1970), *aff'd.*, 37 A.D. 2d 265, 323 N.Y.S. 2d 550 (2d Dept. 1971), *rev'd. on other grounds*, 30 N.Y. 2d 427, 334 N.Y.S. 2d 601 (1972), *cert. denied*, 410 U.S. 931 (1973) the court stated:

> "Exemplary damages are penal in nature and are designed to punish the defendant and to deter him and others from further and similar acts and as a protection to the public. They are only allowed where the wrong results from evil motives of the defendant and to punish and make an example of such conduct. It must, however, appear that there was actual malice or such wantonness or recklessness as to imply or permit an inference of such malice" 309 N.Y.S. 2d 420, 424.

In *Szekely v. Eagle Lion Films,* 140 F. Supp. 843 (S.D.N.Y. 1956), *aff'd.,* 242 F.2d 266 (2d Cir. 1957), *cert. denied,* 354 U.S. 922 (1957), the court, citing the Restatement of Torts §908, stated:

> " . . . such damages may be given 'to punish a wrongdoer and to deter others from the commission of a like wrong' . . . 'to punish a person for his outrageous conduct' " (140 F. Supp. at 850-851).

And in *Dupont Galleries, Inc. v. International Magne-Tape Ltd.,* 300 F. Supp. 1179, 1180 (S.D.N.Y. 1969), the court remarked that:

> "Exemplary damages are awarded only where the tortious conduct is '*** morally culpable . . . ' Walker v. Sheldon, 10 N.Y. 2d 401, 404, 223 N.Y.S.2d 488, 490, 179 N.E. 2d 497, 498 (1961)."

It is evident from the cases cited above that to support an award of punitive damages there must be such wanton and egregious conduct, "close to criminality," as would require that the defendant and others be deterred from similar conduct for the protection of the public. As the court put it in *DeMarasse v. Wolf,* 140 N.Y.S. 2d 235, 238 (Sup. Ct. Queens Co. 1955): "Punitive damages are generally granted as a punishment to the defendant, *and as a protection against the violation of personal rights and social order"* (emphasis added).

In the instant case the prosecution was undertaken upon the advice of counsel that Morrissey was committing the misdemeanor of trespass. Calling the police under these circumstances surely is not conduct so egregious and close to criminality that the public need be protected from its recurrence. Indeed, the contrary is true. Public policy is served by complaint to the police upon advice of counsel that a crime has been committed, and the punishment of crime (and, thereby its deterrence) plainly should be encouraged. In short, prosecution based on a *mistake of law* is simply not the sort of culpable conduct which requires the imposition to a penalty as a deterrent. Any advantage to the public accruing from the discouragement of prosecution based on a mistake of law would be insignificant as compared with the detriment to society resulting from the failure to prosecute offenses for fear that the legal advice that a crime has been committed may prove to be inaccurate. The punishment of crime is a much more important social goal than the punishment of prosecution resulting from a mistake of law.

Therefore, it was error for the court below to submit the issue of punitive damages to the jury.

C. The court below erred in failing to instruct the jury to consider advice of counsel in determining the justifiability and amount of any award of punitive damages.

The court below committed further error in failing to charge the jury that they must consider advice of counsel in determining the justifiability and amount of any award of punitive damages.

In *The Russian Church of Our Lady of Kazan v. Russian Orthodox Greek Catholic Church of America, supra,* the court refused to award punitive damages where the defendant acted on the advice of counsel. And, in *Brown v. McBride,* 24 Misc. 235, 52 N.Y.S. 620, 621 (Sup. Ct. Queens Co. 1898), the court said that "proof of advice of counsel . . . is material to wholly prevent, or to mitigate smart money."

10 Encyclopedia of New York Law, Damages §826 also states that "proof of advice of counsel . . . is material to wholly prevent, or to mitigate smart money . . . . " See also *Godfrey v. Medical Society of New York County, supra.*

It follows that the jury should have been instructed that reliance on advice of counsel should be considered as a complete defense to the claim for punitive damages or at least in mitigation thereof.

D. The court below erred in failing to reduce the award of punitive damages.

As stated above, it was error for the court to submit the issue of punitive damages to the jury. Moreover, even if that issue were appropriate for the jury, and the court below, as required by law, had instructed the jury that advice of counsel must be considered in determining the propriety and amount of punitive damages, the court below also erred in failing to reduce an award of punitive damages of $330,000, when the actual damages found were only $3,500.

The court in *DeMarasse v. Wolf, supra,* stated that punitive damages "ought to be reasonably proportionate to the injury done." (140 N.Y.S. 2d at 239). This is especially true where, as here, the injury is minimal as is evident from the award of $3,500 compensatory damages. That juries are not free to award punitive damages which are significantly disproportionate to the injury is apparent from the many cases in which New York courts have reduced awards of punitive damages. See, *e.g., Maybruck v. Haim,* 40 A.D. 2d 378, 340 N.Y.S. 2d 469 (1st Dept. 1973), *app. denied,* 32 N.Y. 2d 610, 343 N.Y.S. 2d 1025 (1973); *Kern v. News Syndicate Co.,* 20 A.D. 2d 528, 244 N.Y.S. 2d 665 (1st Dept. 1963).

The same principle applies in the federal courts. For example, this Court in *Lanfrancone v. Tidewater Oil Co.,* 376 F.2d 91 (2d Cir. 1967) reduced punitive damages from $35,000 to $5,000.

Accordingly, it was error for the court to fail to reduce the award of punitive damage

POINT VI

THE TRIAL JUDGE ERRED IN REFUSING TO ADMIT INTO EVIDENCE THE IBRAHIM LETTER.

Crucial to the defense of this case was the defendants' contention that plaintiff intentionally sought to have himself arrested in order to test the rule prohibiting distribution of literature inside the hiring hall. If plaintiff's arrest was brought about by his own desire to test the rule, then this fact would

have been evidence negating the element of malice necessary to sustain a claim for malicious prosecution.

In support of the contention that plaintiff purposefully brought about his own arrest, defendants offered a letter sent by a Mr. Ralph Ibrahim to defendant Joseph Curran dated July 27, 1971 immediately following Mr. Morrissey's acquittal on the criminal charge. This letter states (Def's. Ex. B, 833E):

"Dear Brother Curran,

The union membership should be made aware of the fact that the union administration's attempt to limit our constitutional rights to disseminate information within the union hall was made null and void.

It should be brought to the memberships attention that James Morrissey subjected himself to criminal prosecution in order to establish this principle. Consequently, I demand on the behalf of the membership that this letter and the two enclosed articles written by James A. Wechsler of the New York Post on this issue, be presented in full in the next issue of the Pilot.

Fraternally,

Ralph Ibrahim
/s/ Ralph Ibrahim

hm/RI" (Emphasis supplied.)

The author of this letter, Ralph Ibrahim, was no stranger to plaintiff James Morrissey. In point of fact, he ran as a candidate for the National Office of the union with Mr. Morrissey both in the 1969 and 1973 NMU elections, was a member of the two-man Editorial Board of Mr. Morrissey's publication, "The Call" (Plaintiff's Ex. 2, 734E), and has been a co-party plaintiff with Mr. Morrissey in two lawsuits which they have brought against certain officers of the union including defendants Curran and Wall.

When called as a witness at the trial, Mr. Ibrahim testified that he was a member of Mr. Morrissey's group (536A). He also admitted sending the letter, but denied having discussed it with Mr. Morrissey. He could not recall who had typed the letter, and when asked if it had been typed by Mr. Morrissey's wife, Hannah Morrissey, he answered in the negative. This latter question was asked of Mr. Ibrahim because the initials of the stenographer preparing the letter, which appear at the lower left hand corner of the letter, were "hm," the initials of Hannah Morrissey.

Notwithstanding Mr. Ibrahim's denial that Mrs. Morrissey had anything to do with the letter, it was developed through the testimony of a Mr. Terry Lasky, a private investigator, that the envelope in which the letter was sent bore a stamp that had been printed by a Pitney-Bowes stamp machine which bore a meter number that had been leased to the Carl Alley Company located at 437 Madison Avenue, New York. Counsel for Mr. Morrissey then admitted that Mrs. Hannah Morrissey had been an

employee of Carl Alley Company at the time the letter was sent (545A-548A). Mr. Morrissey, himself, testified that his wife had been part of his group working with him on letter writing and typing of pamphlets and letters (493A-495A). Mrs. Morrissey did not testify because she absented herself from the courtroom on the last day of trial when this issue arose, even though she had been present during all prior proceedings, a point of which the trial judge took specific note (549A-550A).

The trial judge refused to admit this letter on the grounds that it was not sufficiently connected directly to Mr. Morrissey. We submit that this was an error. First, the letter was connected directly back to Mrs. Morrissey and, by Mr. Morrissey's own admission, she worked with him in preparing letters and pamphlets. Secondly, it is clear that Mr. Morrissey, Mr. Ibrahim, and Mrs. Morrissey were all part of a group which was working *in concert* in an effort to unseat the incumbent union administration. In such circumstances, the same principles under which the statement of a co-conspirator is admissible against other members of a conspiracy make admissible the statements of members of any group engaged in concerted action against other members of that group. The co-conspirator rule is not limited to criminal proceedings nor does it require that the conspirator whose statement is offered be a party to the litigation. As the Supreme Court stated in *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229, 38 S. Ct. 65, 71-72 (1917):

> ". . . It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because

> the existence of a criminal or unlawful conspiracy is not made to appear by evidence aliunde. The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, *but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful.* The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. *It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them."* (Emphasis supplied.)

Obviously there are issues of credibility with respect to the Ibrahim letter, but he was available for cross-examination. Certainly it cannot be assumed that Mr. Ibrahim made up the statements contained in the letter without having any basis in fact for them, particularly when you look at the long list of

people to whom he sent copies of the letter which included all the attorneys who had represented Mr. Morrissey in defense of the arrest.[3]

The Ibrahim letter was of the utmost importance. It went to a basic issue in the case and should have been admitted to permit the jury to pass not only upon its credibility, but the credibility of Morrissey, Ibrahim and the failure of Morrissey's wife to come forward to explain how a letter bearing her initials as the typist, sent from the office in which she worked, and dealing with the arrest of her husband, was not a correct statement of the circumstances which led to the arrest.[4]

3. Copies of the letter were sent to Mr. Mel Wolf, an attorney for the American Civil Liberties Union, who represented Mr. Morrissey in the criminal proceedings, to Arthur McInerny, Esq., his attorney in the instant case who also appeared in the criminal proceeding, Mr. Paul Chevigney of the New York Civil Liberties Union and Mr. Warren Berry, an investigator with the United States Department of Labor (Def's. Ex. 13, 833E).

4. The rule permitting the admission of statements made by a member of a group that is acting in concert is supported by the circumstantial guarantee of the reliability of such statements arising from the access to accurate information which a member of the group would have, and his identification with the purposes and objectives of the group mitigates against his making any statements against the interests of the group which are not truthful.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, that judgment N.O.V. should be granted to all defendants, or, failing that, a new trial should be ordered.

Respectfully submitted,

Harold E. Kohn, P.A.
and
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A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STAATDS
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Index No.

JAMES MORRISSEY
Plaintiff- Appellant- Appellee,

- against -

NATIONAL MARTIME UNION,
Defendant- Appellant- Appellee,
and
CURRAN et al
Defendants- Appellants.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 28th *day of* November 19 75, *deponent served the annexed* Brief

upon see attached *attorney(s) for*

see attached *in this action, at* see attached

the address designated by said attorney(s) for that purpose by depositing 2 *true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 28th
day of November 19 75.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

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